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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
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Computer III Further Remand )  
Proceedings: Bell Operating )  
Company Provision of Enhanced )  
Services )

CC Docket No. 95

COMMENTS OF PRODIGY SERVICES COMPANY

Prodigy Services Company ("Prodigy") hereby files its comments on the Notice of Proposed Rulemaking released February 21, 1995, in the above-captioned docket.<sup>1</sup> Pursuant to the Notice, the Commission seeks to conduct a cost-benefit calculus concerning the status of structural separation requirements in the aftermath of the Ninth Circuit's second remand of the agency's Computer III policies.<sup>2</sup> Prodigy submits that the Court's analysis together with the record already before the Commission conclusively demonstrate that full structural separation requirements should be retained in the current environment.<sup>3</sup> Prodigy herein offers its views

<sup>1</sup> FCC 95-48 ("Notice").

<sup>2</sup> California v. FCC, 39 F.3d 919 (9th Cir. 1994); see Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958 (1986) (subsequent history omitted).

<sup>3</sup> Prodigy and others have already explained to the Commission that the Common Carrier Bureau's assertion that the existing regulatory regime consists of Computer III comparably efficient interconnection ("CEI") requirements rather than Computer II structural separation requirements is manifestly in error. See discussion infra.

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on that record and the relevance of certain factors to the FCC's cost-benefit calculus.

As set out in the pending Petition for Reconsideration of the Common Carrier Bureau's Waiver Order filed by the Information Technology Association of America ("ITAA") and the supporting comments of Prodigy, the Bureau erred in relying on CEI policies to minimize the scope of the interim structural separation relief granted the Bell Operating Companies ("BOCs").<sup>4</sup> Not only was CEI never intended as anything more than a transitional regulatory mechanism to full open network architecture ("ONA"), the orders adopting the CEI policy were expressly vacated by the Ninth Circuit.<sup>5</sup> As a result, the Bureau lacks the legal authority to reinstate CEI, and the lack of separation of BOC enhanced services under approved CEI plans is no longer legally justifiable.

Rather, the baseline regulatory environment against which the required cost-benefit analysis for structural separation must be conducted is the Computer II regime of

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<sup>4</sup> Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, Memorandum Opinion and Order, DA 95-36 (CCB released Jan. 11, 1995) ("Waiver Order"); ITAA Petition for Reconsideration (Feb. 10, 1995); Comments of Prodigy Services Company in Support of Petition for Reconsideration (Mar. 6, 1995).

<sup>5</sup> See ITAA Petition at 4-5; Prodigy Comments at 2.

complete structural separation of enhanced service offerings.<sup>6</sup> This is critically important because, in the Notice, the Commission appears to assume mistakenly that it should include the transitional costs of a "return to some form of structural separation requirements" in that calculus.<sup>7</sup> In fact, any such costs are not relevant for regulatory purposes because they are caused solely by the continuing erroneous reliance of the BOCs on non-final and/or vacated FCC orders from the Computer III docket. Those costs are solely the responsibility of the BOCs' competitive operations -- and their shareholders -- and cannot be used to bootstrap structural separation relief in this proceeding.

Additional red herring issues raised by the BOCs and the Commission should likewise be ignored. The purported significance of the limited number of access-related complaints that have come to the attention of the FCC is most reasonably attributed to (1) the jurisdictionally intrastate nature of most access disputes (particularly given the limitation of competitive BOC enhanced services to the intraLATA market), (2) the costs and difficulties of litigating at the FCC against a BOC with effectively unlimited regulatory resources, and (3) the frustrations of

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<sup>6</sup> See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980) (subsequent history omitted).

<sup>7</sup> See Notice, ¶ 40.

enhanced service providers who over the years have found federal venues such as the Information Industry Liaison Committee to be slow and in many cases ineffective in securing implementation of ONA services from the BOCs.

Most telling from an enhanced service provider's perspective has been the FCC's response to the Georgia MemoryCall proceeding. On numerous occasions over the past several years, ESPs have explained to the Commission the flaws in its ONA policy and the risks of discrimination the industry faces as a result of the incomplete network unbundling that was required of the BOCs. The Ninth Circuit has now confirmed the logic and validity of the ESPs' analyses of the failures of ONA, and the findings of the Georgia Public Service Commission have confirmed their anticompetitive consequences.<sup>8</sup> Yet, when faced with evidence that its policies were not working and, indeed, could not work, the Commission continued to defend those policies in court while at the same time intervening to prevent state commissions from taking measures to prevent competitive harms in their own jurisdictions. It is difficult to imagine an environment that would have a more chilling impact on the willingness of ESPs to seek relief from the Commission in instances of access discrimination by the BOCs.

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<sup>8</sup> See California v. FCC, 39 F.3d at 929-30.

In sum, the Ninth Circuit explained with unassailable clarity why, absent fundamental unbundling, the FCC's ONA policies could not be relied upon to prevent access discrimination against the BOCs' enhanced service competitors. The Georgia Commission documented the adverse real world impact of that discrimination potential. In contrast, the BOCs have never, in all of the years of the Computer III proceedings, been able to make a showing of any substantial benefits in the form of efficiencies and economies from the removal of structural separation that could withstand public analysis. The results of the cost-benefit calculus are clear, and the Commission should declare that the Computer II full structural separation requirements are and remain effective in governing BOC provision of enhanced services.

Respectfully submitted,  
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By: 

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of

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April 7, 1995